this attempt at an extended and unjustified construction of the conditions of the lease was for the purpose of supplying the missing link of an approved application for the whole area may now be a matter of speculation, but if it was not, why did not the appellants refer to an approved application for the entire area?

In any event, if the appellants' claim was founded on an application approved in 1961 or 1962 or the refusal in 1971, it was clearly in 1979, at the institution of the action, statute-barred and not maintainable against a defence that relied on limitation.

As for the prayer for a stay of execution of the sale of the land in Lease No. 17397, no reason, except for an emotional one, was advanced.

The appeal must be dismissed with costs.

Appeal dismissed.

Solicitors: *Shelley Yap, Chong, Chia & Co.*

YONG JOO CHUAN & ANOR. v. TAN TECK CHIANG

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) September 11 & November 14, 1980]

[Kuching — Federal Court Civil Appeal No. 114 of 1980]

Landlord and Tenant — Tenancy to commence from date of registration of sublease — Notice to quit — Whether valid notice — Sarawak Rent Control Ordinance, ss. 15(1) & 19.

In this case the respondent had agreed to lease the premises to the appellant for a period of 15 years, the tenancy to commence from the date of the registration of the sublease. A memorandum of sublease was subsequently executed on September 3, 1957 and this was registered on September 25, 1957. The premises were protected by the Control of Rent Ordinance. The respondent gave a notice to quit to appellant stating that the memorandum of lease would expire on September 2, 1972. The appellant did not vacate the premises and subsequently the respondent gave notice to expire on October 31, 1972. The appellant claimed possession of the premises. The learned trial judge held that the first notice was valid and gave judgment for the respondent. The appellant appealed.

Held, allowing the appeal: (1) the notice to quit was bad as it did not coincide with the term of the contractual tenancy, which commenced on September 25, 1957 and therefore ended on September 25, 1980;

(2) the respondent had failed to bring their case within any of the grounds set out in section 15(1) of the Rent Control Ordinance and were not entitled to recover possession of the premises.

Cases referred to:-

(1) *Hong Geok Cheng* v. *Elizabeth Jacques* [1981] 1 M.L.J. 12.

(2) *Jong Chim Hap* v. *Pei Hen Fui* [1954] S.C.R. 18, 25.

(3) *Yong Joo Chuan* v. *Tan Teck Chiang* [1978] 1 M.L.J. 173.

(4) *Tan Swee Hoe Co. Ltd.* v. *Ali Hussain Bros.* [1980] 2 M.L.J. 16.

FEDERAL COURT.

Patrick Tan for the appellant.

Chew Pok Oi for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This appeal is against the ruling of the learned judge upholding the validity of a notice to quit.

Respondent is the registered proprietor and landlord of premises described as No. 43, Gambier Road, Kuching. Appellants are the tenants. On July 15, 1957 the parties executed an agreement whereby the respondent agreed to sublet the whole ground floor to the appellants. A lump sum of $18,500 was paid. It was said this was for purchase of the legal interest on the lease which was to be effective from date of registration. The tenancy was for 15 years. The rental was $120 per month. Clause 4 is significant for it states: —

"The landlords shall give vacant possession at the end of the month. An agreement shall be drawn up at the lawyer's office and shall be registered with the Government. The commencing date of tenancy shall be from the date of registration."

Subsequently, on September 3, 1957 the parties entered into a Memorandum of Sublease for a period of 15 years at a rental of $120 per month "commencing from the date hereof." The Memorandum of Sublease was registered at the Land Office, Kuching on September 25, 1957. The premises is protected by the Rent Control Ordinance, 1948 (Cap. 86).

On June 22, 1971 respondent gave appellants a written notice in the following terms: —

"We refer to Memorandum of Sublease No. L.1740/1957 in respect of premises known as No. 43, Gambier Road, Kuching. The said Memorandum of Sublease will expire on the 2nd day of September, 1972. *Please note* that we shall require the said premises for our own use on the expiration thereof and ample notice is hereby given you to look for alternative accommodation in the meantime. We look forward to your kind co-operation in the matter."

Despite the notice, on the purported expiry of the sublease appellants did not vacate the premises. So, on September 5, 1972 another notice was sent to appellants as follows: —

"As instructed by Mr. Tan Teck Chiang the registered proprietor and landlord of the demised premises, in which you are occupying thereof as tenants of our client at the monthly rent of $120 (Dollars One hundred and twenty only) per month, we hereby give you one (1) month's notice to quit and deliver vacant possession of the demised premises, the said notice to take effect from the 1st day of October, 1972, and expire on the 31st day of October, 1972, or to expire at the end of the complete month or your tenancy which will expire next after service of this notice on you."

Appellants mentioned that the tenancy commenced from September 3, 1957 but respondent contended that it should be from date of registration. The learned judge upheld the appellants' contention. We think the learned judge wrong. The Memorandum of Sublease was executed as a result of the Chinese Agreement under which a lump sum of $18,500 was paid to secure a legal interest in the ground floor for a period of 15 years for business purpose. The agreement cannot just be discarded. It indicated the intention of the parties. It is the submission of appellants that the notice to quit dated June 22, 1971 is bad and invalid. Appellants relied on 1st notice. The 2nd notice merely terminates the statutory tenancy. The Sarawak Rent Control Ordinance is peculiar in that the termination of a contractual tenancy does not relieve the landlord from terminating the statutory tenancy according to law. The case of *Hong Geok*

Cheng v. *Elizabeth Jacques*[1] shows that subsection 3 of section 15 provides that "nothing in this section shall be deemed to relieve a landlord from the necessity of determining the tenancy according to law."

We have no evidence whether rent has been paid and accepted after the expiry of the contractual tenancy. This is important to decide whether a tenancy has been created or not. Thus, in *Jong Chim Hap* v. *Pei Hen Fui*[2] Williams C.J. stated: —

"I do consider that a landlord ought to issue his writ in an application under (f) as early as possible after the termination of the tenancy by the year's notice to quit. If he delays for some months thereafter before issue of writ he ought not to accept any payment. If he does, it is certainly advisable for him to issue a second notice to quit terminating what may be held by a court to be a statutory tenancy."

Section 19 sets out the terms of the statutory tenancy as follows: —

"19. A statutory tenant shall hold the premises of the landlord upon the following terms and conditions, namely —

(a) he shall be deemed to hold as tenant from month to month and, subject thereto, shall observe and be entitled to the benefit of all the terms and conditions of the original tenancy, or sub-tenancy, as the case may be, so far as the same are consistent with the provisions of this Ordinance and with a holding from month to month:

Provided that, in the case of a sub-tenant becoming a statutory tenant under and by virtue of the provisions of subsection (2) of section 16, such a statutory tenant shall in addition hold the premises subject to any subsisting restrictive covenants contained in the terms and conditions of the tenancy between the landlord and the tenant.

(b) his tenancy shall be subject to be determined by such notice as would have been required by law to determine a monthly tenancy of the premises containing no express provision for determination."

By their defence appellants do not dispute the sublease. They say that they do not have alternative accommodation available to them for the purpose of their business and that greater hardship will be caused to them by granting the order prayed. They counterclaimed against respondent for an order to restrain respondent, his agents, children and/or licensees from interfering with the use and enjoyment of the premises.

The sublease was registered on September 25, 1957. Clause 4 of the sublease provides that the commencing date of tenancy shall be from the date of registration.

Respondent claimed possession either on the ground of expiry of the sublease or of requiring the premises for his own use under section 15(1) of the said Ordinance. He also claimed for mesne profits and costs. The learned judge was right to say that the premises was protected from the moment of the sublease by the said Ordinance. As such the landlord could only recover possession under one of the grounds set out in section 15.

Notice required under the said Ordinance is a technical notice determining the relationship of landlord and tenant. It must be definite and unambiguous. In delivering the judgment of this court in *Yong Joo Chuan* v. *Tan Teck Chiang*[3] relating to question of amendment the late Ong Hock Sim F.J. stated: —

"It (the letter) may show an intention to take back possession after September 1972. Whether it is competent to so determine during the currency of a term may be in doubt. As a notice to determine it should be clear, unequivocal and certain."

The learned judge stated the statement was not the ratio of the case but an *obiter*. He gave these reasons in holding that the letter amounted to a valid notice to quit. First, the letter expressed respondent's intention to take the premises back for his own use and gave appellants sufficient notice to look for alternative accommodation. Letter was written one year before expiry of sublease on September 2, 1972. Secondly, the learned judge considered that the ambiguity expressed by this court arose as a result of the sentence "we look forward to your kind co-operation in this matter." He thought this was merely a polite gesture on respondent's part which did not detract from the respondent's intention. Thirdly, the learned judge took the view that appellants were aware of the intention of respondent by reference to correspondence between the parties. In short, respondent said appellants had certain premises of their own but the latter denied having such premises. These reasons do not in any way destroy the doubt of this court, that is, whether a notice is competent to determine a tenancy during the currency of the tenancy. There is no authority to support the contention of respondent that it could do so. The onus is on the respondent who asserts it. He has not discharged it.

The notice should not have coincided with the term of the contractual tenancy and ended with it. It should expire at least a day after the tenancy or better still a longer period of expiry. In any case we consider the tenancy to take effect from date of registration. This view would at once make the notice ineffectual as on September 2, 1972 the contractual tenancy was still running so could not be terminated by a notice which was premature. The agreement dated July 15, 1957 was in writing. An oral promise given at the time of contracting which induces a party to enter into a contract overrides any inconsistency in the agreement. See *Tan Swee Hoe Co. Ltd.* v. *Ali Hussain Bros.*[4]

If the 1st notice is good then the 2nd notice in order to terminate the statutory tenancy according to law must be identical to the 1st notice since the claim for possession is under section 15(1) of the said Ordinance. They cannot succeed in claiming possession merely on ground of lapse of the contractual tenancy since the writ was not issued immediately after the expiry of the lease and also the premises are protected by the said Ordinance. This means that where a tenancy is protected by the said Ordinance a tenant can only be deprived of his tenancy under one of the grounds set out in section 15(1) of the said Ordinance. Respondent has failed in our view to bring his case within any of the grounds as the 1st notice was bad.

We would allow the appeal with costs here and the court below. Deposit to be refunded to appellants.

Appeal allowed.

Solicitors: *Yong & Co.; Chan, Jugah, Wan Ullok & Co.*